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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

RONALD L. COSBY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

Of Counsel:

DONALD E. ENGLE
WILLIAM R. POWER
BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
777 Main Street
Forth Worth, Texas 76102
(817) 878-2350

BETTY JO CHRISTIAN *
CHARLES G. COLE
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
Attorneys for Petitioner Burlington Northern Railroad Company

* Counsel of Record

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
ARGUMENT	2
CONCLUSION	7

TABLE OF AUTHORITIES

CASES

Allis-Chalmers Corp. v. Lueck, 53 U.S.L.W. 4463 (U.S. April 16, 1985) 4

Baltimore Steam Packet Co. Acquisition, Control, Etc., 244 I.C.C. 583 (1941) 2

Berkemer v. McCarty, 104 S. Ct. 3138 (1984) 6

Carlson v. Green, 446 U.S. 14 (1980) 6

Chicago, Milwaukee, St. Paul & Pacific Railroad—Reorganization—Acquisition by Grand Trunk Corp., Finance Docket No. 28640 (Sub-No. 9) (I.C.C. filed Aug. 5, 1982) 3

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981) 6

Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967) 7

NLRB v. Food Store Employees Union, 417 U.S. 1 (1974) 7

Trailways of New England, Inc.—Purchase—Boston & Maine Transportation Co., 80 M.C.C. 697 (1959) 2

Penn-Central Merger & N&W Inclusion Cases, 389 U.S. 486 (1968) 4

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REPLY BRIEF OF PETITIONER

The Petition demonstrated that the decision below is contrary to forty-five years of administrative interpretation and the clear legislative history of section 5(2)(f), *see* Petition for Writ of Certiorari at 8-14. Without even attempting to challenge this showing, respondents seek to evade further review by asserting that the decision below is limited to its facts. That assertion is belied, however, by (1) the numerous claims already advanced by motor carrier employees on the basis of the Eighth Circuit's decision, (2) the dramatic demonstration of the industry-wide impact of the decision below made by the Association of American Railroads in its brief *amicus curiae*, and (3) the contrary claims of respondents' own counsel in ongoing administrative proceedings.

ARGUMENT

I

The Petition shows that the court of appeals' holding contradicts the Commission's longstanding, consistent interpretation that employees of a non-railroad subsidiary are not "railroad employees." [1] In their Opposition, respondents do not even attempt to dispute the thrust of the Petition, nor do they make an effect to justify the lower court's disregard of established precedent.[2] Respondents also make no effort to show how the unique economic circumstances that gave rise to section 5(2)(f) of the Interstate Commerce Act have any application to motor carrier employees in the 1980's.[3]

Instead of addressing petitioner's position, respondents merely allege that the decision below is limited to its facts. On the contrary, the substantial impact of the Eighth Circuit's decision is described in detail by the Association of American Railroads in its brief *amicus curiae*.[4] Respondents' claims as to the limited scope of the decision cannot be reconciled with the positions taken by motor

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[1] *See* Petition for Writ of Certiorari at 8-14.

[2] Respondents incorrectly assert that the Commission precedent cited by petitioner did not develop in the context of railroad proceedings. In fact, railroads were parties in the Commission's initial decision denying mandatory labor protection to employees of a non-railroad subsidiary, *Baltimore Steam Packet Co. Acquisition, Control, Etc.*, 244 I.C.C. 583 (1941) (Atlantic Coast Line Railroad; Seaboard Air Line Railway; Southern Railway), as well as other ICC decisions. *See also Trailways of New England, Inc.—Purchase—Boston & Maine Transportation Co.*, 80 M.C.C. 697 (1959) (Boston & Maine Railroad).

[3] *See* Petition for Writ of Certiorari at 10-12; Brief *Amicus Curiae* of Association of American Railroads in Support of the Petition at 5-12 [hereinafter cited as AAR Brief].

[4] AAR Brief at 12-19. While petitioner consented to the filing of this brief, respondents withheld consent. A motion for leave to file the *amicus* brief is currently pending.

carrier unions who have argued for broad application of the Eighth Circuit's ruling on pending proceedings before the Commission.[5] In fact, counsel for respondents in this case has argued that under the Eighth Circuit's ruling "employees of a wholly-owned motor carrier subsidiary which is controlled and 'intimately tied' to the . . . rail operation" are entitled to mandatory labor protection, even though the motor carrier subsidiary is not restricted to auxiliary to rail service.[6] The fact that motor carrier unions are relying on a broad reading of the decision below to demand the benefits of *New York Dock* in a variety of factual contexts demonstrates that the Eighth Circuit's decision is not limited as the government and respondents suggest.

The government confirms that the Eighth Circuit's interpretation of section 5(2)(f) is clearly wrong, but suggests that the case does not warrant plenary review because "it is not likely to have a significant adverse effect on the Commission's administration of the Interstate Commerce Act." Brief at 8. The government, however, fails to recognize that more is at stake than its own "administration" of a statute. The decision below has already created substantial uncertainty affecting pending and future mergers. Moreover, the possibility of litigation over the large amounts of money involved in mandatory, six-year labor protection has introduced new complexities into labor negotiations in the transportation industry. This case presents the proper vehicle for this Court to resolve the confusion regarding the reach of section 5(2)(f) and to prevent the unnecessary litigation of this issue before

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[5] *See* Petition for Writ of Certiorari at 15.

[6] Position Paper of Seventy (70) Individual Employees of Milwaukee Motor Transportation Co. Seeking Employee Protective Conditions, *Chicago, Milwaukee, St. Paul & Pacific Railroad—Reorganization—Acquisition by Grand Trunk Corp.*, Finance Docket No. 28640 (Sub-No. 9) (I.C.C. filed Aug. 5, 1982).

the Commission and the courts.[7] Given the dynamic character of the present transportation industry, *see* AAR Brief at 18-19, prompt resolution of this important issue is required.

II

The Petition demonstrated that the court of appeals exceeded its jurisdiction in determining whether the claimants' dismissals were the result of the BN-Frisco merger.[8] The Petition also showed that the court below exceeded its jurisdiction and usurped an administrative function when it ordered the Commission to grant specific relief. Once again respondents avoid the substance of the Petition and place primary reliance on the argument that petitioner failed to raise these issues adequately in the court below.

Contrary to respondents' assertion, petitioner raised both these issues at the first time it could raise them—in its Petition for Rehearing before the Eighth Circuit. This proceeding began with respondents' request that the Commission reopen the merger proceeding and "make appro-

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[7] Respondents' suggestion that the Court review this issue at a later date in a different case is disingenuous. As this Court is well aware, merger proceedings involve extensive records, raise multiple issues and can take years to wend their way through the Commission and the courts. *See, e.g., Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486, 494 (1968) (merger under consideration for 10 years). In the interim, the Eighth Circuit's ruling could inhibit other consolidation proceedings and complicate and distort those proceedings that do occur. This relatively simple and straightforward case presents the ideal vehicle for the Court to resolve this issue.

[8] Under *New York Dock*, resort to arbitration was clearly required. *See Allis-Chalmers Corp. v. Lueck*, 53 U.S.L.W. 4463 n.1 (U.S. April 16, 1985) ("The use of the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid . . . arbitration procedures.").

priate orders for BN to comply with the employee protective provisions [of New York Dock]." [9] When the Commission refused to reopen the earlier proceeding at all, respondents appealed to the Eighth Circuit; the only issue before the court of appeals was whether the Commission abused its discretion by not reopening the underlying merger proceeding. The panel, however, not only determined whether the proceeding should be reopened, but also went on to decide the two questions disputed here. The panel purported to decide the factual issue of causation—usurping the function of the arbitration committee contemplated by *New York Dock*—and ordered the Commission to impose specific relief—usurping the administrative function of the Commission.

In its Petition for Rehearing before the Eighth Circuit, Burlington Northern stressed that the only issue properly before the Court of Appeals was whether the Commission should have reopened the merger proceeding and that "[i]f the agency abused its discretion by not reopening, the remand should *only* require reopening." [10] Petitioner argued that the Commission, not the court, was the proper authority to determine what, if any, labor protection should be imposed because "[i]t is the ICC's exclusive jurisdiction under section 11347 to fashion and prescribe protection based on its own factual determinations." [11] On remand, the Commission's decision on the type of labor protection to impose would in turn determine whether causation issues would go to an arbitration committee as

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[9] Petition to Re-open, Request for Compliance of Commission Order, Evidence & Argument in Support thereof at 15.

[10] Intervenor Burlington Northern Railroad Company's Petition for Rehearing and Suggestion for Rehearing *En Banc* at 11 (emphasis in original).

[11] *Id.* at 12.

mandated by *New York Dock* conditions, or be decided in some other forum. Thus the lower court's prescription of relief and circumvention of arbitration are clearly issues capable of review by this Court.[12]

As to causation, respondents do not attempt to dispute that the court was without jurisdiction to decide this issue. As to the relief issue, respondents assert that the Eighth Circuit simply determined that "under this case of first impression, the Respondents were railroad employees" entitled to receive the benefits of the *New York Dock* conditions. Opp. at 15.[13] The assertion that this is a case of first impression ignores the fact that the level of benefits imposed under section 5(2)(c) is a settled administrative question and that the Commission has never required more than three months' severance pay for motor carrier employees pursuant to that section.[14] But even assuming a question of first impression were involved, that would provide more—not less—reason to obtain the views of the Commission as to the scope of the

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[12] *Berkemer v. McCarty*, 104 S. Ct. 3138, 3148 n.23 (1984); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); *Carlson v. Green*, 446 U.S. 14 (1980).

[13] The petition demonstrated that the court of appeals could not order relief under § 5(2)(c) because this section requires an exercise of discretion by the Commission. The only justification proffered by respondents for the court's § 5(2)(c) ruling is reliance on the court's first holding that respondents were "railroad employees." Opp. at 15. To the extent that respondents are utilizing the court's first holding to support its ordering of relief under § 5(2)(c), they are admitting that no independent basis exists for the latter ruling. Respondents' own argument demonstrates that the court's alternative holding under the discretionary provision of § 5(2)(c) cannot stand as a proper independent basis for the decision.

[14] *See* Petition for Writ of Certiorari at 13.

benefits to be granted. *See NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 (1974).[13]

CONCLUSION

This case is distinguished by an unusual fact: none of the four briefs submitted to the Court in this case purports to defend the Eighth Circuit's unprecedented construction of section 5(2)(f) on the basis of the prior decisions of the Commission, the legislative history, or economic rationale of the statute. The only dispute here is over the impact of the Eighth Circuit's error. Petitioner submits that the decision below warrants plenary review by this Court in order to insure that it does not continue to have a chilling effect on merger proceedings and labor negotiations at this critical time in the surface transportation industry. At a minimum, the Eighth Circuit's patently erroneous decision should be summarily reversed in order to reinstate the Commission's longstanding rule that *New York Dock* conditions do not apply to the employees of non-railroad subsidiaries.

Respectfully submitted,

Of Counsel:

DONALD E. ENGLE
WILLIAM R. POWER
BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
777 Main Street
Forth Worth, Texas 76102
(817) 878-2350

BETTY JO CHRISTIAN *
CHARLES G. COLE
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Petitioner
Burlington Northern
Railroad Company

* Counsel of Record

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[13] *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967), cited by respondents, is inapposite. The issue in *Neely* was whether a court of appeals, after holding that the evidence at trial was insufficient, could order a district court to dismiss an action.